# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

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| STATE OF WASHINGTON, | ) | No. 56163-4-I |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| HERBERT J. SCHORR, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellant. | ) | FILED: July 31, 2006 |
| | ) | |

PER CURIAM. Herbert Schorr was convicted of residential burglary and unlawful possession of methamphetamine. Schorr contends his trial counsel was ineffective because he failed to request an unwitting possession instruction, and the prosecutor engaged in misconduct by calling attention to the fact that Schorr did not present witnesses to corroborate his alibi. We reject these arguments and affirm.

## FACTS

Todd Bunger lived in an apartment on his in-laws' property. On May 7, 2004, he saw a strange man emerge from a red car in their driveway and enter their house. The man was wearing a backpack. Bunger called 911 and reported he thought a burglary was in progress. Twenty minutes later, Bunger saw the man emerge from the house, still wearing the backpack and also carrying a duffel bag. The man drove away.

Whatcom County Sheriff Deputy Scott Huso was in the vicinity and stopped a car matching the one Bunger had described. The driver gave his name as Jason Smith. Deputy Huso determined the car was registered to a third party. He observed a backpack on the front passenger seat, a duffel bag on the rear seat, and a pellet gun on the floor.

In the meantime, Bunger's mother-in-law, Charlotte Lucas, had returned to her home, spoken with police, and confirmed that some of her belongings were missing.

Police searched the car. In the backpack, they found items reported missing from Lucas's home, a spoon with crystallized residue, and hypodermic needles indicative of methamphetamine use. In the duffel bag, police found other items belonging to Lucas. In the trunk, they found a black pouch containing a battery charger and a small glass pipe of a type used for smoking methamphetamine. In a hollow compartment in the battery charger, they found a small bag containing methamphetamine. Police also determined the driver's real name was Herbert Schorr.

Schorr was charged with residential burglary and unlawful possession of methamphetamine.

At trial, Schorr admitted that he gave a false name to the officers, because he had an outstanding arrest warrant. He denied any involvement in the burglary, and testified that he never went into Lucas's home. He claimed that the backpack belonged to a woman named Becky Smith, a woman he met briefly while mountain biking; that Smith had visited the house Schorr shared with his roommates, leaving her backpack there; that Smith had called the house and asked that the backpack be brought to her, giving Lucas's address; that he had agreed, and borrowed his roommate's car; that the backpack was

already in the car when he got into it; and that he was unaware of the contents of the backpack, had never opened the trunk, and was also unaware of its contents.

Schorr also testified that he had not had contact with any of his former roommates or with Smith since his arrest. Detectives testified they had been unable to locate Smith or the registered owner of the car.

The jury returned guilty verdicts on both charges.

## ANALYSIS

Effective Representation. To demonstrate ineffective assistance of counsel, Schorr must demonstrate that his attorney's representation was deficient, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The first prong requires the appellant to a show that trial counsel's representation fell below an objective standard of reasonableness, based on a consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Our scrutiny of trial counsel's performance is highly deferential, and we indulge in a strong presumption of reasonableness. Id. Counsel's decisions pertaining to case theory or trial tactics do not provide a basis for finding ineffective assistance. State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). Thus, Schorr must show the absence of any legitimate tactical rationale for the challenged conduct. McFarland, 127 Wn.2d at 336. Schorr fails to meet this burden.

Schorr contends his trial counsel was ineffective in failing to request an instruction on the affirmative defense of unwitting possession. A defendant may assert the

affirmative defense of unwitting possession if he can establish, by a preponderance of the evidence, that he was unaware he possessed the substance, or did not know the nature of the substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). An instruction on unwitting possession can be given if there is evidence to support the theory. State v. Trujillo, 75 Wn. App. 913, 917, 883 P.2d 329 (1994).

Here, the jury was instructed on constructive possession, and in closing argument, defense counsel argued that Schorr neither actually nor constructively possessed the methamphetamine.

There was evidence to support this argument. The backpack contained used methamphetamine paraphernalia, but no methamphetamine. The methamphetamine was secreted inside a battery charger in a black pouch in the trunk of the car, and the car did not belong to Schorr.

The evidence of unwitting possession, however, was problematic, because it depended upon Schorr's testimony, and his credibility was severely challenged. He admitted lying repeatedly to police about his name and about whether he had been in Alaska six months before his arrest. He denied knowledge of the contents of the backpack, which he was seen carrying into the house and which was later found to contain Lucas's belongings. He also denied knowledge of the contents of the duffel bag, which he was seen carrying from the house and which also contained Lucas's belongings. In addition, the prosecutor impeached Schorr with prior convictions for forgery, shoplifting, residential burglary, and possession of stolen property.

Given the credibility issues, we cannot say it was an unreasonable strategy for

counsel to focus on the best defense to the drug charge—to wit, that Schorr had no dominion or control over the methamphetamine in the trunk.

Prosecutorial Conduct. Schorr next contends the prosecutor engaged in misconduct by calling attention to the fact that Schorr did not present witnesses to corroborate his testimony, thereby shifting the burden of proof to Schorr. Prosecutorial misconduct requires reversal when the defendant demonstrates a substantial likelihood that the misconduct affected the verdict. State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209 (1991). Unless the defendant objects, misconduct justifies reversal only if it was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

Schorr testified that he had been unable to contact Smith or any of his former roommates, including the owner of the car, and that he had no current contact information for these individuals. On cross-examination, the prosecutor asked Schorr, without objection, whether Smith would corroborate his story, and Schorr said, "No, I don't think she would, to be perfectly honest with you." Report of Proceedings (RP) (Mar. 8, 2005) at 170.

Based on this evidence, the State sought a missing witness instruction. The missing witness doctrine allows an inference that a witness would give testimony unfavorable to a party who fails to call that witness, where it would be natural for the witness to be presented by that party. State v. Frazier, 55 Wn. App. 204, 211–12, 777 P.2d 27 (1989). If the doctrine applies, it is not misconduct for a prosecutor to comment on a defendant's failure to call a witness. State v. Blair, 117 Wn.2d 479, 487–88, 816

P.2d 718 (1991); State v. Contreras, 57 Wn. App. 471, 474–75, 788 P.2d 1114 (1990). Otherwise, however, a prosecutor may not imply that a defendant has any duty to present exculpatory evidence. Barrow, 60 Wn. App. at 872. A prosecutor may always argue reasonable inferences from the evidence presented and may attack a defendant's exculpatory evidence. Blair, 117 Wn.2d at 487–88.

The court declined to give a missing witness instruction here. Schorr contends that the questions above and the argument set forth below amount to a violation of this ruling and shifted the burden of proof to him to present witnesses. As with the questions above, Schorr made no objection at trial to the arguments he complains of now.

During closing, the prosecutor stated:

> There's really no evidence of conspiracy here. There weren't witnesses that came in that said [Schorr's] roommates were out to get him, or that they had concocted something. Those people are not even available apparently according to the defendant. His side is not supported by the evidence.

RP (Mar. 8, 2005) at 221–22.

Schorr's counsel argued that Schorr may have been "set up" by others, stating:

> Mr. Schorr was on the stand . . . . He is very straightforward with what he did. There to do a favor, goes to the house. . . . Did he know what's in the backpack or the trunk? No. [I]t's not in evidence, ladies and gentlemen of the jury, but the owner of the car and Becky Smith . . . put that backpack, stolen property in the car for what purpose? Mr. Schorr doesn't know. I can speculate. I'll certainly ask you to speculate. Someone asks someone, one person asks another person to go on what may be a bogus mission. The mule in a drug case almost. You have no idea that the bag you're carrying to take over to Aunt Martha's house is full of stolen property or drugs, okay, no idea, hoping maybe the thing will just get dropped off there, not to let anybody else be implicated, set up for the fall. Now, we'd like to have been able to provide that.

Id. at 235–36.

In rebuttal, the prosecutor stated:

> [Schorr] says he was told to take a . . . backpack full of stolen property from a burglary that morning back to the house it had been burglarized from by a person he met mountain biking once who happened to know his roommates, none of whom he can locate now, and none of whose names he gave to the officers so that the officer could try to clear him of the crime that he was being accused of.

Id. at 251–52.

Because he did not object, Schorr must demonstrate that the alleged misconduct is so flagrant and ill-intentioned that its prejudicial effect could not have been cured by the court. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).

We see no misconduct here. Schorr's explanation of events required the conclusion that someone known to him had asked him to carry a backpack containing stolen items and drug paraphernalia to the address from which the items had been stolen that very morning. The prosecutor appropriately questioned the reasonableness of his testimony, and did not imply that the unavailable witnesses would have given testimony unfavorable to Schorr. There was no misconduct.

We affirm Schorr's convictions.

FOR THE COURT:

/s/ ELLINGTON, J.

/s/ BECKER, J.

/s/ SCHINDLER, J.